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No. 86-1159

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

TCI CABLEVISION, INC.,
COMMUNITY TELE-COMMUNICATIONS, INC.,
and TELE-COMMUNICATIONS, INC.,
Petitioners,

v.

CENTRAL TELECOMMUNICATIONS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the First Amendment entitle an entrenched cable operator to employ personal threats, "commercial blackmail," "pure fraud," and other "unethical and illegal acts"—in the words of the courts below—solely to block competition from other cable operators and continue its monopoly, as the jury found?

2. Were petitioners improperly denied independent appellate review of the record, when the Court of Appeals "thoroughly examined the record" and concluded—citing and quoting from particular portions of the record—that "[t]here is substantial support in the record" for the jury's findings?

3. Was petitioners' conduct legitimate lobbying constitutionally protected by the *Noerr-Pennington* doctrine, when that conduct included personal warnings that were understood to be murder threats, commercial blackmail, fraud, intimidation of the elderly residents of a senior citizens' home, threats to "make trouble" for a competitor in another market, and the like?

PARTIES TO THE PROCEEDINGS

Petitioners TCI Cablevision, Inc., Community Tele-Communications, Inc., and Tele-Communications, Inc., were defendants-appellants below. Respondent Central Telecommunications, Inc., was plaintiff-appellee below. Pursuant to Rule 28.1, respondent notes that it has no parents, subsidiaries, or affiliates.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Central Telecommunications, Inc. ("Central") respectfully prays that this Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

Petitioners (collectively "TCI") were awarded a three-year cable television franchise for the Jefferson City market in 1978. Shortly before the franchise was due to expire, the City initiated a bidding process to solicit bids to determine the next franchisee. Respondent Central and one other company—Teltran—submitted bids. TCI

refused to do so, and instead undertook a campaign "accompanied by numerous unethical and illegal acts" to block the award of a franchise to anyone other than itself. App. at 2a.

The tactics employed by TCI included personal threats directed against a consultant hired by the City to evaluate bids. TCI's vice president and national director of franchising threatened the consultant as follows:

> We know where you live, where your office is and who you owe money to. We are having your house watched and we are going to use this information to destroy you. You made a big mistake messing with T.C.I. We are the largest cable company around[.] We are going to see that you are ruined professionally. [App. at 13a.]

As the Court of Appeals noted, the consultant "understood these statements to be a threat to the lives of himself and his family." *Id.* TCI also contacted another large cable company that was a client of the consultant, and thereafter the consultant lost the company as a client. *Id.*

In an effort to pressure the City to award it the franchise, TCI refused to pay past-due franchise fees of over $60,000 to the City, a tactic the District Court characterized as "nothing short of commercial blackmail." *Id.* at 45a. TCI publicly announced that it would cut off service if it were not awarded the franchise, and threatened that it would not sell "one bolt" of its system to a new franchisee "at any cost." *Id.* at 14a. TCI threatened to flood the Jefferson City market with satellite dishes if it were not given the cable franchise, a threat the District Court found to be "pure fraud." *Id.* at 45a. TCI's system manager told the elderly residents of a senior citizens' home that they would be without television for two years if TCI were not granted the franchise, "because the concrete walls of their residence would not allow reception of over-the-air stations." *Id.*

at 14a. TCI's vice president also met with the chief operating officer of Teltran, "and threatened him that unless Teltran withdrew from the bidding process, TCI would make trouble for Teltran in Columbia, Missouri, where it operated a cable television franchise." *Id.* at 12a. Teltran withdrew. *Id.*

After the foregoing, TCI and certain City officials—including the mayor—met secretly to negotiate a franchise for TCI, in violation of state law and the rules for the bidding process. *Id.* at 13a & n.8, 14a. When the City Council nonetheless voted 6-4 to award a franchise to Central, the mayor—who had previously recused himself from the process due to an alleged conflict of interest—vetoed the award. *Id.* at 14a. The Council then deadlocked 5-5 on an award to TCI. The mayor broke the tie in favor of TCI, which was awarded a seven-year de facto exclusive franchise. *Id.* at 14a-15a.

Central filed suit to recover for the damage caused by TCI's successful efforts to block it from competing in Jefferson City. Central sued on the basis of (1) conspiracy to unreasonably restrain trade, (2) actual monopolization, and (3) tortious interference with a business expectancy, in violation of state law. After 31 days of trial, a jury the District Court regarded as "extremely attentive" returned a verdict in favor of Central under *each* of the three theories. *Id.* at 39a.[1]

The District Court denied TCI's motions to set aside the jury verdict. App. at 38a. The District Court rejected TCI's argument that the First Amendment precluded recovery by Central for the harm caused by TCI's conduct, noting that the argument "misperceives the theory of the case that was submitted to the jury" and "is nothing more than a red herring." App. at 47a, 55a. With respect to TCI's claim that its conduct was con-

[1] Execution by Central would be on the state law judgment for tortious interference.

stitutionally protected by the *Noerr-Pennington* doctrine, the District Court reviewed the specifics of that conduct and concluded that "[t]he record clearly contained sufficient evidence to support the jury's finding" that the conduct of defendants was not protected. App. at 44a.[2]

The Court of Appeals affirmed. In his opinion for the unanimous court, Judge Heaney noted that there was "a significant factual problem" with TCI's First Amendment argument, concluding that the argument "fails on its facts" in light of the "substantial evidence in the over 7,000-page record in support of [the] conclusion by trial judge and jury" that TCI did not seek simply to remain in the market but to continue its monopoly. App. at 4a. The court also rejected TCI's *Noerr-Pennington* defense, noting that the jury could have based liability entirely on conduct TCI *conceded* was not protected. App. at 15a-16a. The court also upheld the instructions to the jury on the defense, finding them "proper under the case law, the facts of this case, and in light of the instructions submitted by the parties." App. at 19a.[3] The court found it unnecessary to reach several other reasons raised by Central why TCI's conduct was not protected, though it did note that "some of these arguments may have merit." App. at 25a n.15.[4]

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[2] In contrast, the District Court found that Central "at all times remained within legitimate lobbying channels in seeking a cable television franchise." *Id.* at 61a.

[3] The Court of Appeals concluded that "the jury could properly have found, based on the facts and the court's instructions, that TCI's activities, more than being simply anti-competitive, were not genuine lobbying activities at all but instead were heavy-handed attempts to directly interfere with the business relationships of a competitor, to disturb the political process and to coerce the City into extending TCI's monopoly position, even though Central offered a superior cable system at lower cost." App. at 20a n.11.

[4] Central argued that the *Noerr-Pennington* doctrine did not even apply since the City was acting in a commercial rather than governmental capacity; that the City's role was not protected

TCI filed the instant petition after the Eighth Circuit denied rehearing and unanimously rejected TCI's suggestion for rehearing *en banc*. App. at 83a.

REASONS THE PETITION SHOULD BE DENIED

TCI's petition presents four questions for review, some of which may well merit consideration by this Court in an appropriate case. Whatever significance these questions may have in the abstract, however, none of them is presented on the facts of this particular case. As the Court has noted on several occasions, it sits to decide cases, not abstract or hypothetical questions.[5] The facts of this case—found by a jury and affirmed on review by the District Court and the Court of Appeals—preclude reaching the broad questions presented in TCI's petition. The petition should therefore be denied.

I. No First Amendment Issue Is Presented on the Facts of This Case

TCI's petition seeks to present a question concerning municipal regulation of cable television. *See* Pet. at i. That question is not presented in this case.

"state action" clearly sanctioned under Missouri law; and that the doctrine was inapplicable in light of the jury finding of an illegal conspiracy between TCI and certain City officials. App. at 25a n.15.

[5] For example, in *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959), the Court was compelled to dismiss a writ of certiorari as improvidently granted, when the broad question presented in the petition turned out not to be presented on the record.

As Justice Brennan noted for the Court:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of [the conflict] can await a day when the issue is posed less abstractly. [*Id.* at 184.]

The jury found that TCI, through a campaign "accompanied by numerous unethical and illegal acts," blocked Central from competing for a cable television franchise in Jefferson City. App. at 2a. Despite the fact that TCI held and holds the de facto exclusive franchise in Jefferson City, TCI nonetheless argued below that Central was not injured by TCI's efforts, because the First Amendment precludes such franchises.[6] TCI contends that it had no objection to other competitors entering the market, and simply sought to exercise its own First Amendment right to remain in the market. Pet. at 5. As the court below stated, however, "[b]efore reaching the merits of this argument, we note that there is a significant factual problem with it." App. at 4a.

The "significant factual problem" is that the jury found on the basis of " 'substantial evidence' " that TCI's activities were not merely efforts to remain in the market and exercise its First Amendment rights, but rather were " 'a calculated scheme to prevent [Central] from entering the Jefferson City market and to maintain a *de facto* exclusive franchise for themselves.' " App. at 4a (quoting District Court, App. at 53a). TCI attempted to defend its "unethical and illegal acts" by claiming that it sought to remain in the market, and that it had a First Amendment right to do so. As the court below held, however, "TCI's first amendment defense *fails on its facts* because it did not seek to simply remain in the market but to continue its monopoly." App. at 4a (emphasis supplied).[7]

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[6] Throughout the petition, TCI refers to its franchise as "nonexclusive" and the franchise sought by Central as "exclusive." *See, e.g.*, Pet. at 2. The franchises, however, were the same and were described by the court below as "de facto exclusive." App. at 2a n.1.

[7] TCI acknowledges this as "an alternative holding" of the court below. Pet. at 9 n.9. TCI does not attempt to explain how this Court could reach the question it seeks to present, in light of the conceded alternative holding.

To reach the question TCI raises in its petition, it would first be necessary for this Court to review and overturn the jury's factual finding, affirmed on review by both the District Court and the Court of Appeals. For regardless of whether the First Amendment permits a municipality to award a de facto exclusive franchise, it clearly does not sanction "unethical and illegal acts" by one competitor designed to destroy another. App. at 2a. *See Associated Press* v. *United States*, 326 U.S. 1, 19-20 (1945).

In short, the entire First Amendment issue TCI seeks to raise hinges on TCI's assertion that it sought not to block competition but to remain in the market itself. The jury found as a fact—supported by "substantial evidence in the over 7,000-page record"—that this was simply not the case. App. at 4a. As the District Court concluded:

> [TCI] had every opportunity to produce evidence and make arguments to convince the jury that [Central's] exclusion from the Jefferson City market was the result of either the city's efforts to artificially limit the number of franchisees or [Central's] unwillingness to compete head-to-head with [TCI] in the market. [TCI] also enjoyed every opportunity to produce evidence and make arguments to persuade the jury that they were at all times in favor of head-to-head competition in the marketplace. If the jury had been swayed by any of these arguments, it would not have found against [TCI]. [App. at 55a.]

Nor was it even necessary for the jury to find that the cable market in Jefferson City was a "natural monopoly," as TCI assumes it did in framing the First Amendment issue. *See* Pet. at i, 9, 14-20. The case was presented to the jury on alternative theories. If the jury found that the market *was* a natural monopoly, it was to consider whether TCI engaged in anti-competitive or predatory conduct with respect to competition *for* the

market. If, on the other hand, the jury found that the market was *not* a natural monopoly, it was instructed to consider whether TCI engaged in such conduct with respect to competition *in* the market. As the District Court noted:

> [I]t was never necessary for the jury to frontally consider [TCI's] "First Amendment defense." If the jury had found that the city was solely responsible for artificially limiting the number of franchisees in the Jefferson City market, then *a fortiori* it would have found neither that [TCI] possessed monopoly power nor that [TCI] caused the city to veto [Central's] franchise. Conversely, since the jury found that [TCI] possessed monopoly power and that [TCI] caused the city to veto [Central's] franchise, the Court is compelled to conclude that [TCI's] "First Amendment defense" is nothing more than a red herring. [App. at 54a-55a.]

The court below reached the merits of TCI's First Amendment defense only by "[a]ssuming arguendo" that TCI was willing to engage in legitimate competition, contrary to the jury verdict. App. at 4a. Even the court's discussion of the merits, however, was carefully circumscribed:

> [W]e make clear, as did the Supreme Court in *Preferred Communications*, that we are unwilling to decide any question which is not squarely before us and on which there has not been a full development of the record. We are not faced here with a challenge to the details of Jefferson City's franchise regulations * * *. [App. at 9a-10a.]

Every one of the cases cited by TCI as presenting the issue it seeks to raise in this case involved litigation between a cable operator and a municipality or other governmental authority. *See* Pet. at 13 n.18. This case does

not.[8] It involves litigation between competing cable operators, and any question of the scope of the municipality's powers was considered "only in terms of the competing technologies offered by TCI and Central." App. at 10a. This Court should not attempt to answer any questions concerning municipal regulation of cable television in a dispute between private litigants where no party—municipality or otherwise—participated in support of the regulation. As the District Court noted, "the true issue in this case was whether defendants were responsible for plaintiff's exclusion from the Jefferson City market. The jury's conclusion that defendants were responsible parties completely undermines any attempt to pass the blame on to the city by way of an amorphous 'First Amendment defense' in this case." App. at 55a.

Even if this Court were inclined to consider the issue of a municipality's powers with respect to cable franchising, it should do so in a case in which that question is directly presented, and not in a case in which "there has not been a full development of the record" on that issue. App. at 10a. As the cases cited by TCI indicate, *see* Pet. at 13 n.18, there will be no shortage of suitable cases.

The result in this case does not depend on whether the cable market in Jefferson City is a natural monopoly, nor on whether the City may award an exclusive franchise. Given the alternate theories of the case on which the jury was instructed, it could have found TCI liable based on a finding that the market was *not* a natural monopoly. The jury found that it was TCI—not the City—that injured Central. The broad question of the

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[8] Although the City was originally a party to this action, TCI filed no cross-claim against the City, and the City was subsequently dismissed from the case and did not participate in any way in the trial or the subsequent appeal. Nor is it a party before this Court.

City's powers with respect to cable franchising is simply not presented in this case.

II. The Court of Appeals Independently Reviewed the Record

TCI maintains that the court below erred because it did not independently review the jury's "implied finding" that the Jefferson City market was a natural monopoly. Pet. at 21. In fact, the Court of Appeals did precisely what TCI contends it should have done. The court below did not simply defer to the "implied finding," nor did it uphold it on the basis of a deferential "clearly erroneous" standard of review. On the contrary, the court independently reviewed the record and concluded that "[t]here is substantial support *in the record* for these factual findings." App. at 10a (emphasis supplied). The court specifically referenced a study and quoted from testimony in the record that it considered particularly supportive of the implied finding. *Id.* at 10a n.6.[9]

Contrary to TCI's assertion, the court below thus fully complied with the requirements of *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), assuming that the standard in that case even applies.[10] TCI cites the evidence it submitted to the jury, Pet. at 21, but the short answer is that the jury chose not to believe that evidence but instead to believe the evidence submitted by Central. As the court below held after its independent review of the record, there was "substantial support" for the jury's conclusion. App. at 10a. Since the court below applied the *Bose* standard of

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[9] As Judge Heaney stated at oral argument, the Court of Appeals went so far as to listen to the tapes of the closing arguments of counsel at trial.

[10] Since this was an antitrust and tortious interference case rather than a First Amendment case, of course, the court below was not required to follow the *Bose* standard of review. The factual findings below make it unnecessary even to reach the specific factual issue that TCI contends must be independently reviewed.

review, this Court should not review the entirely fact-bound question of whether the evidence supports TCI or Central. In any event, the "implied finding" of natural monopoly was not even necessary to support the jury's verdict, in view of the alternate theories of the case. *See* App. at 50a-55a. Even if TCI were correct on this point, the result would be unchanged.

III. The Court of Appeals Correctly Applied the *Noerr-Pennington* Doctrine, and TCI's Conduct Would Not Be Protected Under Any Conceivable Interpretation of *Noerr-Pennington*

TCI contends that the Court of Appeals adopted an unduly restrictive view of the *Noerr-Pennington* doctrine, permitting the jury to find it liable on the basis of conduct that should have been protected as legitimate lobbying. Pet. at 22-29. The court below, however, correctly applied the *Noerr-Pennington* doctrine, and TCI's conduct in this case far exceeded the scope of any conceivable conduct protected by *Noerr-Pennington.* In any event, the jury could have found— and probably did find —TCI liable on the basis of conduct TCI itself concedes is unprotected by *Noerr-Pennington.*

TCI employs a variety of euphemisms to describe its conduct in blocking Central's effort to compete: "robust" persuasion, "political activity," "aggressive lobbying," "unpopular lobbying." Pet. at 4, 22, 23. The courts below, however, took a decidedly different view, describing TCI's conduct as "unethical and illegal acts," "coercive threats," "excessive and intimidating conduct," "commercial blackmail," "pure fraud," "complete fraud," "misstatements," and "illegal private negotiations." App. at 2a, 15a, 25a, 45a, 40a, 14a, 23a n.13. According to TCI, "TCI, *and* Central, *and* the City all apparently engaged in activity about which none of them can be very proud, judging from the accusations and counter-accusations which were made by the parties." Pet. at 24

(emphasis in original). Judging from the jury's findings, however, it was solely TCI representatives who did the following:

- Threatened a consultant retained by the City to evaluate bids by stating: "We know where you live, where your office is and who you owe money to. We are having your house watched and we are going to use this information to destroy you. You made a big mistake messing with T.C.I. We are the largest cable company around[.] We are going to see that you are ruined professionally." App. at 13a.
- Publicly attacked the qualifications of the consultant in a defamatory manner. *Id.* at 12a.
- Threatened the chief operating officer of a rival bidder, Teltran, that "unless Teltran withdrew from the bidding process, TCI would make trouble for Teltran in Columbia, Missouri, where it operated a cable television franchise." (Teltran withdrew.) *Id.*
- "[T]old elderly residents of a senior citizens' home that TCI would cut off service if denied a franchise, and the residents would be without television for two years pending construction of a new system because the concrete walls of their residence would not allow reception of over-the-air stations." *Id.* at 14a.
- Withheld $60,000 in past-due franchise fees due the City to pressure the City to award it a franchise. TCI paid the past-due fees the day after it was awarded its new franchise. App. at 14a-15a.
- Misrepresented to the City Council that TCI was the largest distributor of satellite dishes in the country, and the exclusive distributor in Missouri, implying that "TCI would flood the City with satellite dishes unless it received the franchise." *Id.* at 14a. As the District Court noted, the threat

was "a complete fraud," since TCI "had never participated in the satellite dish business." *Id.* at 40a.

This is not "aggressive lobbying"; it is not "robust" persuasion. Whatever "problems" the lower courts may be experiencing in applying the *Noerr-Pennington* doctrine, Pet. at 23, it is inconceivable that any court would consider the foregoing—including conduct perceived to be a threat on human life—constitutionally protected conduct.[11] No federal judge in this case has been willing to embrace TCI's argument that its conduct was protected, when death threats and similar conduct—all designed to destroy competition and a competitor—were the hallmark of TCI's actions.[12] The Court of Appeals concluded that "our review of the record reveals full support for the jury's and trial judge's conclusion that TCI overstepped the boundaries of *Noerr-Pennington* protection." App. at 24a. This Court should not undertake a third review of that question.

In any event, TCI concedes that certain of the threats made by its representatives are *not* protected under the *Noerr-Pennington* doctrine. Pet. at 10 n.10, 29 n.41; App. at 15a. As the Court of Appeals held, the jury could have found TCI liable solely on the basis of those concededly unprotected threats. App. at 15a-16a. TCI contends that there is no way of knowing if the jury based its verdict on the unprotected activity or on activ-

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[11] Contrary to TCI's assertions, the decision below in no way conflicts with *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975), or *Rural Electric Co.* v. *Cheyenne Light, Fuel & Power Co.*, 762 F.2d 847, 850 (10th Cir. 1985). The most egregious conduct in *Metro Cable* was the use of campaign contributions to influence a legislative body; *Rural Electric* involved only unobjectionable lobbying. Neither case remotely involved threats, defamation, blackmail, fraud, or intimidation of the sort described by the courts below.

[12] As the Court of Appeals stated, the argument that TCI's conduct was protected "proved too much for the trial judge and jury, and it proves too much for us." App. at 25a.

ity TCI claims is protected, but, as the court below noted, "the parties agreed to submit the case to the jury on a general verdict instruction and form, and there is evidence in the record as a whole to support the verdict." App. at 16a.[13]

IV. The Jury's Verdict Was Fully Supported By Circumstantial and Direct Evidence

TCI's fourth question—contingent on a grant of its third—need not detain this Court any longer than it apparently detained petitioners. TCI briefly contends that the jury should not have been permitted to find TCI liable on the basis of concededly unprotected conduct—the threats directed at the consultant and Teltran—because there was no *direct* evidence that the conduct harmed Central. Pet. at 29-30. TCI relies exclusively on two decisions from the previous century, *Manning* v. *Insurance Co.*, 100 U.S. 693 (1879), and *United States* v. *Ross*, 92 U.S. 281 (1875).

This question plainly does not merit the attention of the Court. The jury verdict can be sustained without reference to the particular threats directed at the consultant and Teltran, as the jury could have found TCI liable on the basis of other unprotected conduct. *See* App. at 24a. In addition, *Manning* and *Ross* considered the use of *legal presumptions* in finding facts; no such presumptions were employed in this case. Finally, TCI does not even attempt to demonstrate why this fact-bound question—which, even assuming the validity of

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[13] The Court of Appeals also noted that TCI failed to request that the jury be instructed that certain conduct it now claims is protected could not—standing alone—form the basis of liability. As the court stated: "Had TCI made a simple clear request that the jury be so instructed, it would have been error to refuse the request. But it appears from the record as a whole that TCI was not satisfied with this approach. It rather wanted and requested a broader instruction that would have immunized other conduct which the jury could well have found unlawful." App. at 16a-17a.

TCI's argument, has apparently not troubled the Court for over a century—now warrants review.

CONCLUSION

For the foregoing reasons, and those in the opinion below, the petition should be denied.

Respectfully submitted,

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